

decreases in the Contract or bond amount. The notice must contain the information specified from time to time in agreements between the Surety and SBA. SBA may deny liability with respect to Final Bonds for which SBA has not received timely notice.

(4) *Fees.* The PSB Surety must pay SBA 25% of the Premium it charges on Final Bonds. The fee is rounded to the nearest dollar. The PSB Surety must also remit to SBA the Principal's payment for its guarantee fee of \$8 per thousand dollars of the Contract amount. This fee is also rounded to the nearest dollar. The Surety must remit SBA's Premium share and the Principal's guarantee fee with the bordereau listing the related Final Bond, as required in the PSB Agreement.

(5) *Increases/decreases in Contract or bond amount.* (i) The PSB Surety must process Contract or bond amount increases within its allotment in the same manner as initial guaranteed bond issuances (see paragraph (g)(3) of this section). The Surety must present checks for additional fees due from the Principal and the Surety on the increases (computed under paragraph (g)(4) of this section), and attach such payments to the respective monthly bordereau.

(ii) If the Contract or bond amount is decreased, SBA will refund to the Principal a proportionate amount of the guarantee fee, and adjust SBA's Premium share accordingly in the ordinary course of business.

(6) *Events requiring notification.* The PSB Surety must advise SBA within 30 calendar days of the name and address of a Principal against whom legal action on the bond has been instituted, or when the Obligor has declared a default, or when the Surety has established a claim reserve. The Surety must also notify SBA within 30 days of the recovery of any amounts on the guaranteed bond, or if the Surety determines to bond such Principal again.

#### **§ 115.61 Guarantee percentage.**

SBA reimburses a PSB Surety in an amount not to exceed 70% of the Loss incurred and paid. Where the Contract amount, after the Execution of the bond, increases beyond the statutory limit of \$1,250,000, SBA's share of the Loss is limited to that percentage of the increased Contract amount which the statutory limit represents, multiplied by the guarantee percentage approved by SBA. For an example, see § 115.31(d).

#### **§ 115.62 Imminent Breach.**

(a) *No prior approval requirement.* SBA will reimburse a PSB Surety for the

guaranteed portion of payments the Surety makes to avoid or attempt to avoid an Imminent Breach of the terms of a Contract covered by an SBA guaranteed bond. The PSB Surety does not need SBA approval to make Imminent Breach payments.

(b) *Amount of reimbursement.* The aggregate of the payments by SBA cannot exceed 10% of the Contract price, unless the Administrator finds that a greater payment (not to exceed the guaranteed portion of the bond penalty) is necessary and reasonable. In no event will SBA make any duplicate payment pursuant to this or any other provision of the regulations in this part.

(c) *Recordkeeping requirement.* The PSB Surety must keep records of payments made to avoid Imminent Breach.

#### **§ 115.63 Claims for reimbursement of Losses.**

(a) *How claims are submitted.* A PSB Surety must submit claims for reimbursement on a form approved by SBA no later than 1 year from the date the Surety paid the amount. Loss is determined as of the date of receipt by SBA of the claim for reimbursement, or as of such later date as additional information requested by SBA is received. Subject to the offset provisions of part 140, SBA pays its share of Loss within 90 days of receipt of the requisite information. Claims for reimbursement and any additional information submitted are subject to review and audit by SBA.

(b) *Surety action.* The PSB Surety must take all necessary steps to mitigate Losses when legal action against a bond has been instituted, when the Obligor has declared a default, or when the Surety has established a claim reserve. When the Surety disposes of any collateral, it must do so at fair market value. Unless SBA notifies the Surety otherwise, the Surety must take charge of all claims or suits arising from a defaulted bond, and compromise, settle or defend the suits. The Surety must handle and process all claims under the bond and all settlements and recoveries in the same manner as it does on non-guaranteed bonds.

(c) *Reservation of rights.* The payment by SBA of a PSB Surety's claim does not waive or invalidate any of the terms of the PSB Agreement, the regulations in this part 115, or any defense SBA may have against the Surety. Within 30 days of receipt of notification that a claim or any portion of a claim should not have been paid by SBA, the Surety must pay the specified amounts to SBA.

#### **§ 115.64 Denial of liability.**

In addition to the grounds set forth in § 115.19, SBA may deny liability to a PSB Surety if:

(a) The PSB Surety's guaranteed bond was Executed in an amount which, together with all other guaranteed bonds, exceeded the allotment for the period during which the bond was approved, and no prior SBA approval had been obtained;

(b) The PSB Surety's loss was incurred under a bond which was not listed on the bordereau for the period when it was approved; or

(c) The loss incurred by the PSB Surety is not attributable to the particular Contract for which an SBA guaranteed bond was approved.

Dated: November 16, 1995.

Philip Lader,

Administrator.

[FR Doc. 95-28549 Filed 11-24-95; 8:45 am]

BILLING CODE 8025-01-P

### **13 CFR Part 125**

#### **Government Contracting Assistance**

**AGENCY:** Small Business Administration.

**ACTION:** Proposed rule.

**SUMMARY:** In response to President Clinton's Government-wide regulatory reform initiative, the Small Business Administration (SBA) has completed a page-by-page, line-by-line review of all of its existing regulations to determine which should be revised or eliminated. This proposed rule would eliminate seven sections which are currently contained in 13 CFR Part 125 pertaining to SBA's procurement assistance programs. The Part would be retitled Government Contracting Assistance.

**DATES:** Comments must be submitted on or before December 27, 1995.

**ADDRESS:** Written comments should be addressed to David R. Kohler, Regulatory Reform Team Leader, (125), Small Business Administration, 409 3rd Street, S.W., Suite 13, Washington, D.C. 20416.

**FOR FURTHER INFORMATION CONTACT:** John W. Klein, Chief Counsel for Special Programs, at (202) 205-6645.

**SUPPLEMENTARY INFORMATION:** On March 4, 1995, President Clinton issued a Memorandum to Federal agencies, directing them to simplify their regulations. In response to this directive, SBA has completed a page-by-page, line-by-line review of all of its existing regulations to determine which should be revised or eliminated. 13 CFR Part 125 is presently titled "Procurement Assistance" and consists

of 12 sections. This proposed rule would change the title to "Government Contracting Assistance" and would reduce the number of sections to six. SBA's regulatory review indicated that seven sections could be eliminated as unnecessary (repeating statutory provisions), obsolete, or inappropriate.

#### Section-by-Section Analysis

The following is a section-by-section analysis of each provision of SBA's regulations that would be affected by this proposed rule:

Current § 125.1 is a statement of policy paraphrased from the Small Business Act (the Act). SBA proposes to eliminate this language as being unnecessary and duplicative and replace it with a brief description of the programs included in Part 125.

Current § 125.2 contains definitions such as "Administrator," "SBA," and "procurement." The proposed rule would eliminate these definitions as unnecessary. Revised regulations on the Prime Contracting Assistance program, now found at § 125.6, would become § 125.2. These regulations have been simplified to eliminate a lengthy list of duties performed by SBA procurement center representatives and breakout procurement center representatives, which are already contained in the Act and the Federal Acquisition Regulation (FAR). In addition, the set-aside and breakout appeals procedures have been shortened to incorporate the procedures already set forth in the FAR.

Section 125.3 is presently an introduction. The proposed rule would eliminate this as unnecessary and replace it with revised regulations on the Subcontracting Assistance program now found at § 125.9. The revised subcontracting assistance regulations have been clarified and rewritten in plain language for ease of use, but no substantive changes are proposed.

Current § 125.4 is a summary of statutory provisions contained in the Act. SBA proposes to eliminate this summary as being unnecessary and duplicative. Revised regulations on the Government Property Sales Assistance program, now found at § 125.8, would become § 125.4. These regulations have been clarified and rewritten in plain language for ease of use, but no substantive changes are proposed.

The proposed rule would eliminate that portion of the current regulation which deals with size standards and rules for timber sales, since those rules are already set forth in Part 121 of this title.

On August 21, 1992, SBA published in the Federal Register (57 FR 37909) a proposed revision of 13 CFR § 125.5,

SBA's regulations on the Certificate of Competency (COC) program. Due to the passage of time, and after review of all previous comments, SBA is again proposing revised regulations for comment.

The proposed rule would also make further technical changes to COC rules. It would eliminate referrals to SBA for eligibility determinations under the Walsh-Healey Public Contracts Act (WHPCA) (previously proposed § 125.5(d)). Section 7201 of the Federal Acquisition Streamlining Act of 1994 (FASA) repealed the "regular dealer" or "manufacturer" eligibility requirements imposed by WHPCA for offerors on contracts subject to the Act.

This proposed rule would change the \$25,000 threshold (under which a contracting officer has no right to appeal an initial affirmative COC decision to SBA Headquarters) referenced in § 125.5(b)(11) of the previously proposed COC regulation to dollar values that coincide with either contracting actions valued under \$100,000, or the use of Simplified Acquisition Threshold (SAT) procedures implemented under FASA.

The proposed rule would also make some minor technical edits to SBA's earlier proposed rule dealing with the COC program. The following substitutions have been made from the rule as originally proposed: (1) references to the Office of Procurement Assistance have been changed to the Office of Government Contracting; (2) references to the Associate Administrator for Procurement Assistance have been changed to the Associate Administrator for Government Contracting; (3) references to Regional Administrators have been deleted; (4) references to the Assistant Regional Administrator for Procurement Assistance have been changed to Area Director for Government Contracting.

The proposed rule would also make several changes to the Prime Contractor Performance Requirements (Limitations on Subcontracting), which were earlier proposed as part of the COC regulatory package published for public comment on August 21, 1992 (57 FR 37909). This proposed rule would separate those provisions into a separate section 125.6, since the provisions have applicability outside the COC process. The comments, however, relate back to the COC proposal as published on August 21, 1992.

A commenter to that rule suggested that SBA make it clear that this section applies to both the DoD Small Disadvantaged Business (SDB) set aside program, including the SDB 10% evaluation preference, and SBA's MED

(8(a)) program. SBA agrees and has revised the earlier proposed regulation accordingly.

Another comment suggested clarification of the applicability of this requirement to sealed bidding situations. Since the "limitations on subcontracting" requirement applies to negotiated and formally advertised procurements as well as to procurements under the Simplified Acquisition Threshold, SBA considers it unnecessary to state this again in the regulation. In the case of a formally advertised procurement, compliance with the requirement will be determined after bid opening and before contract award through the procuring agency's preaward evaluation procedures. This requirement applies only to small business set-asides or that portion of a procurement set aside for small business.

A comment suggested that the regulation address the need for SBA to evaluate compliance with this requirement for the base period and all option periods of a contract. SBA has not revised the regulation since a failure to comply with the requirement in the course of contract performance is considered to be a material breach of contract. Contracting officers already have remedies to assure compliance with the requirement.

Another comment suggested that SBA clarify that the term "materials" includes purchases made by a small business which are "normal commercial practices within the industry." SBA has revised the regulation to include normal commercial practices within the industry.

Another comment suggested that SBA clarify whether Government-specified sources referenced within a solicitation are included in the definition of "cost of materials." SBA has not changed the regulation in response to this comment because the definition of "subcontracting" in § 125.5(c)(4)(vii) states that where the prime contractor has been directed by the Government to utilize a specific source, the costs associated with such a purchase will be considered as the cost of materials.

One commenter suggested that a separate definition for "off-the-shelf" items should be added to this section. SBA has adopted this suggestion.

Finally, a commenter suggested that SBA clarify the use of "part-time" employees in the definition of "personnel" in this section rather than reference § 121.404 of this Title. SBA has not adopted this suggestion because the definition of "employee" in SBA's size regulations at part 121 includes part-time employees.

SBA proposes to eliminate in its entirety current § 125.7 which deals with Defense Production Pools. Although such Pools continue to be authorized by statute, their formation is such a rare event that it is unnecessary to have a separate regulation on the subject when it can be adequately dealt with on a case-by-case basis.

SBA also proposes to delete in its entirety current § 125.10 dealing with the Procurement Automated Source System (PASS). Since this computerized information data base on small business contractors is governed by contractual provisions, it is unnecessary to have a separate regulation on the topic.

The proposed rule would eliminate § 125.11 which describes the Technology Assistance Program. This program has been administratively discontinued and is no longer in operation.

Current § 125.12 describes the Natural Resources Development Program or "tree-planting program." SBA would eliminate this section as obsolete since Congress no longer provides funds for this program.

Compliance With Executive Orders 12612, 12778, and 12866, the Regulatory Flexibility Act (5 U.S.C. 601, et seq.), and the Paperwork Reduction Act (44 U.S.C. Ch. 35)

SBA certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of Executive Order 12866 or the Regulatory Flexibility Act, 5 U. S. C. 601, et seq. This rule would eliminate seven sections of SBA's regulations that SBA has determined to be obsolete, unnecessary, or duplicative. The remaining regulations have been rewritten for clarity and ease of use. No contracting opportunities for small business would be affected by this proposed rule. Therefore, it is not likely to have an annual economic impact of \$100 million or more, result in a major increase in costs or prices, or have a significant adverse effect on competition or the U.S. economy.

For purposes of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA certifies that this proposed rule, if adopted in final form, would contain no new reporting or recordkeeping requirements.

For purposes of Executive Order 12612, SBA certifies that this rule would not have any federalism implications warranting the preparation of a Federalism Assessment.

For purposes of Executive Order 12778, SBA certifies that this rule is drafted, to the extent practicable, in

accordance with the standards set forth in Section 2 of that Order.

#### List of Subjects in 13 CFR Part 125

Government contracts; Government procurement; Reporting and recordkeeping requirements; Small businesses; Technical assistance.

For the reasons set forth above, SBA proposes to revise Part 125 of Title 13 of the Code of Federal Regulations as follows:

### PART 125—GOVERNMENT CONTRACTING PROGRAMS

#### Sec.

- 125.1 Programs included.
- 125.2 Prime contracting assistance.
- 125.3 Subcontracting assistance.
- 125.4 Government property sales assistance.
- 125.5 Certificate of Competency program.
- 125.6 Prime contractor performance requirements (limitations on subcontracting).

Authority: 15 U.S.C. 634(b)(6), 637, and 644; 31 U.S.C. 9701, 9702.

#### § 125.1 Programs included.

The regulations in this part relate to the Government contracting assistance programs of SBA. There are four main programs: Prime contracting assistance; Subcontracting assistance; Government property sales assistance; and the Certificate of Competency program. The objective of the programs is to assist small businesses in obtaining a fair share of Federal Government contracts, subcontracts, and property sales.

#### § 125.2 Prime contracting assistance.

(a) *Traditional PCR responsibilities.*  
(1) SBA Procurement Center Representatives (PCRs) are located at Federal agencies and buying activities which have major contracting programs. PCRs review all acquisitions not set aside for small businesses to determine whether a set-aside would be appropriate. In cases where there is disagreement between a PCR and the contracting officer over the suitability of a particular acquisition for a small business set-aside, the PCR may initiate an appeal to the head of the contracting activity. If the head of the contracting activity agrees with the contracting officer, SBA may appeal to the secretary of the department or head of the agency. The procedures and time limits for such appeals are set forth in § 19.505 of the Federal Acquisition Regulation (FAR). (48 CFR 19.505).

(2) PCRs review and evaluate the small business programs of Federal agencies and buying activities and make recommendations for improvement. They also recommend small business, small women-owned business, and

small disadvantaged business sources for use by contracting activities and assist these businesses in obtaining Federal contracts and subcontracts. Other authorized duties of a PCR are set forth in the FAR in 48 CFR 19.402(c) and in the Small Business Act in Section 15(a) (15 U.S.C. 644(a)).

(b) *BPCR responsibilities.* (1) SBA is required by section 403 of Public Law 98-577 to assign a breakout PCR (BPCR) to major contracting centers. A major contracting center is a center that, as determined by SBA, purchases substantial dollar amounts of other than commercial items, and which has the potential to achieve significant savings as a result of the assignment of a BPCR.

(2) BPCRs advocate full and open competition in the Federal contracting process and recommend the breakout for competition of items and requirements which previously have not been competed. They may appeal the failure by the buying activity to act favorably on a recommendation in accord with the appeal procedures set forth in § 19.505 of the FAR (48 CFR 19.505). BPCRs also review restrictions and obstacles to competition and make recommendations for improvement. Other authorized functions of a BPCR are set forth in 48 CFR 19.403(c) of the FAR and Section 15(l) of the Small Business Act (15 U.S.C. 644(l)).

#### § 125.3 Subcontracting assistance.

(a) The purpose of the subcontracting assistance program is to achieve maximum utilization of small business by major prime contractors. The Small Business Act requires other than small firms awarded contracts by the Federal Government in excess of \$500,000, or \$1 million for construction of a public facility, to submit a subcontracting plan to the contracting agency. The FAR sets forth the requirements for subcontracting plans in 48 CFR subpart 19.7 and 48 CFR 52.219-9.

(b) Upon determination of the successful subcontract offeror, but prior to award, the prime contractor must inform each unsuccessful subcontract offeror in writing of the name and location of the apparent successful offeror. This is applicable to all subcontracts over \$10,000.

(c) SBA Commercial Market Representatives (CMRs) facilitate the process of matching large prime contractors with small, small disadvantaged, and small women-owned subcontractors. CMRs identify, develop, and market small businesses to the prime contractors and assist the small firms in obtaining subcontracts.

(d) Each CMR has a portfolio of prime contractors and conducts periodic

compliance reviews and needs assessments of the companies in this portfolio. CMRs are also required to perform opportunity development and source identification. Opportunity development means assessing the current and future needs of the prime contractors. Source identification means identifying those small, small disadvantaged, and small women-owned firms which can fulfill the needs assessed from the opportunity development process.

(e) CMRs offer additional assistance to small businesses: (1) Advice to representatives of small firms interested in obtaining subcontracts from Federal prime contractors;

(2) Information and assistance on how to identify subcontract opportunities and what opportunities are currently available; and

(3) Information and assistance on the qualifications required to become eligible for inclusion on potential source listings of large firms for future subcontract requirements.

(f) CMRs also perform the following duties:

(1) Assisting both Government agencies and prime contractors in the formulation of subcontracting plans and providing contractors with potential sources to help them comply with their plans;

(2) Assisting PCRs, upon request, in reviewing subcontracting plans submitted by prime contractors prior to contract award;

(3) Evaluating compliance by contractors with the contract clause entitled "Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns";

(4) Recommending small, small disadvantaged, and small women-owned firms to prime contractors and Government agencies for performance of subcontract requirements; and

(5) Maintaining liaison and contact with prime contractors to assist in advance procurement planning and to foster increased utilization of small businesses.

#### **§ 125.4 Government property sales assistance.**

(a) The purpose of SBA's Government property sales assistance program is to:

(1) Insure that small businesses obtain their fair share of all Federal real and personal property qualifying for sale or other competitive disposal action; and

(2) Assist small businesses in obtaining Federal property being processed for disposal, sale, or lease.

(b) SBA property sales assistance primarily consists of two activities:

(1) Obtaining small business set-asides when necessary to insure that a

fair share of Government property sales are made to small businesses; and

(2) Providing advice and assistance to small businesses on all matters pertaining to sale or lease of Government property.

(c) The program is intended to cover the following categories of Government property:

(1) Sales of timber and related forest products;

(2) Sales of strategic material from national stockpiles;

(3) Sales of royalty oil by the Department of Interior's Minerals Management Service;

(4) Leases involving rights to minerals, petroleum, coal, and vegetation; and

(5) Sales of surplus real and personal property.

(d) SBA has established specific small business size standards and rules for the sale or lease of the different kinds of Government property. These provisions are contained in §§ 121.501 through 121.514 of this title.

#### **§ 125.5 Certificate of Competency Program.**

(a) *General.* (1) The Certificate of Competency (COC) Program is authorized under section 8(b)(7) of the Small Business Act. A COC is a written instrument issued by SBA to a Government contracting officer, certifying that one or more named small business concerns possess the responsibility to perform a specific Government procurement (or sale) contract. The COC Program is applicable to all Government procurement actions.

(2) A contracting officer must, upon determining a low responsive small business offeror to be nonresponsible, refer that small business to SBA for a possible COC, even if the next low responsive offeror is also a small business.

(3) A small business offeror referred to SBA as nonresponsible may apply to SBA for a COC.

(b) *COC Eligibility.* (1) The offeror seeking a COC has the burden of proof to demonstrate its eligibility for COC review. To be eligible for the COC program, a firm must meet the following criteria:

(i) It must qualify as a "small business concern" under the size standard applicable to the procurement. Where the solicitation fails to specify a size standard or Standard Industrial Classification (SIC) code, SBA will assign the appropriate size standard to determine COC eligibility. SBA determines size eligibility as of the date described in § 121.404 of this title.

(ii) A manufacturing, service, or construction concern must demonstrate

that it will perform a significant portion of the proposed contract with its own facilities, equipment, and personnel. The contract must be performed or the end item manufactured within the United States, its territories, possessions, or the Commonwealth of Puerto Rico.

(iii) A non-manufacturer making an offer on a small business set-aside contract for supplies must furnish end items that have been manufactured in the United States, its territories, possessions, or the Commonwealth of Puerto Rico by a small business. Non-manufacturing concerns may apply for a waiver of this requirement under §§ 121.1301 through 121.1305 of this title for either the type of product being procured or the specific contract at issue.

(iv) A non-manufacturer submitting an offer on a procurement utilizing simplified acquisition threshold procedures with a cost that does not exceed \$25,000, or on any unrestricted procurement, must furnish end items manufactured in the United States, or its trust territories, possessions, or the Commonwealth of Puerto Rico. Any COC shall apply to the responsibility of the non-manufacturer, not to that of the manufacturer.

(v) An offeror intending to provide a kit consisting of finished components or other components provided for a special purpose, is eligible if:

(A) It meets the Size Standard for the SIC code assigned to the procurement; and

(B) More than 50% of the total dollar value of the components of the kit were manufactured by small businesses under the size standard applicable to the component provided. The offeror need not itself be the manufacturer of any of the components of the kit. Each component comprising the kit must be produced or manufactured in the United States or its trust territories, possessions, or the Commonwealth of Puerto Rico. Where the Government has specified any item for the kit which is not manufactured by a small business, then such item shall be excluded from the determination of total value for the purposes of this section.

(2) SBA will determine a concern ineligible for a COC if the concern, or any of its principals, appears in the "Parties Excluded From Federal Procurement Programs" section found in the U.S. General Services Administration Office of Acquisition Policy Publication: List of Parties Excluded From Federal Procurement or Nonprocurement Programs. If a principal is unable to presently control the applicant concern, and appears in

the Procurement section of the list due to matters not directly related to the concern itself, responsibility will be determined in accordance with paragraph (c)(9) of this section.

(3) An eligibility determination will be made on a case by case basis, where a concern or any of its principals appears in the Nonprocurement Section of the publication referred to in paragraph (b)(2) of this section.

(c) *Referral of nonresponsibility determination to SBA.* (1) A contracting officer who determines that an apparently successful offeror that has certified itself to be a small business with respect to a specific Government contract lacks any element of responsibility (including competency, capability, capacity, credit, integrity or tenacity or perseverance) must refer the matter in writing to the SBA Government Contracting Area Office (Area Office) serving the area in which the headquarters of the offeror is located. The referral must include a copy of the following:

- (i) Solicitation;
- (ii) Offer submitted by the concern whose responsibility is at issue for the procurement (as of Best and Final Offers for a negotiated procurement, and as of bid opening for a sealed bid procurement);
- (iii) Abstract of Bids, where applicable, or the Contracting Officer's Price Negotiation Memorandum;
- (iv) Preaward survey, where applicable;
- (v) Contracting officer's written determination of non-responsibility;
- (vi) Technical data package (including drawings, specifications, and Statement of Work); and
- (vii) Any other justification and documentation used to arrive at the nonresponsibility determination.

(2) Contract award must be withheld by the contracting officer for a period of

15 working days (or longer if agreed to by SBA and the contracting officer) following receipt by the appropriate Area Office of a referral which includes all required documentation.

(3) The COC referral must indicate that the offeror has been found responsive to the solicitation, but at the same time must identify the reasons for the nonresponsibility determination.

(d) *Application for COC.* (1) Upon receipt of the contracting officer's referral, the SBA Area Office will inform the concern of the contracting officer's negative responsibility determination, and offer it the opportunity to apply to SBA for a COC by a specified date.

(2) The COC application must include all information and documentation requested by SBA and any additional information which the firm believes will demonstrate its ability to perform on the proposed contract. The application should be returned as soon as possible, but no later than the date specified by SBA.

(3) Upon receipt of a complete and acceptable application, SBA may elect to visit the applicant's facility to review its responsibility. Where a service or construction contract will be performed outside the United States or its trust territories, possessions, or the Commonwealth of Puerto Rico, SBA will rely solely on documentation and other relevant information obtained within the United States. SBA personnel may obtain clarification or confirmation of information provided by the applicant by directly contacting suppliers, financial institutions, and other third parties upon whom the applicant's responsibility depends.

(e) *Incomplete applications.* If an application for a COC is materially incomplete or is not submitted by the date specified by SBA, SBA will close the case and so notify the contracting

officer. The basis for its decision will be specified in a declination letter sent to both the concern and the contracting officer.

(f) *Reviewing an application.* (1) The COC review process is not limited to the areas of nonresponsibility cited by the contracting officer. SBA may, at its discretion, independently evaluate the COC applicant for all elements of responsibility, but it may presume responsibility exists as to elements other than those cited as deficient. SBA may deny a COC for reasons of nonresponsibility not originally cited by the contracting officer.

(2) A small business will be rebuttably presumed nonresponsible if any of the following circumstances are shown to exist:

(i) Within three years before the application for a COC, the concern, or any of its principals, has been convicted of an offense or offenses that would constitute grounds for debarment or suspension under FAR subpart 9.4 (48 CFR Subpart 9.4), and the matter is still under the jurisdiction of a court (e.g., the principals of a concern are incarcerated, on probation or parole, or under a suspended sentence); or

(ii) Within three years before the application for a COC, the concern or any of its principals has had a civil judgment entered against it or them for any reason that would constitute grounds for debarment or suspension under FAR subpart 9.4 (48 CFR Subpart 9.4).

(g) *Decision by Area Director.* After reviewing the information submitted by the applicant and the information gathered by SBA, the Director will make a determination, either final or recommended as set forth in the following chart:

Contracting actions	SBA official or office with authority to make decision	Finality of decision; options for contracting agencies
\$100,000 or less, or in accordance with Simplified Acquisition Threshold procedures.	Director may approve or deny .....	Final. The Director will notify both the applicant and contracting agency in writing of the decision.
Between \$100,000 and \$25 million. ....	(1) Director may deny. .... (2) Director may approve, subject to right of appeal and other options.	(1) Final. (2) Contracting agency may proceed under paragraph (h) or paragraph (1) of this section.
Exceeding \$25 million .....	(1) Director may deny .....	(1) Final.
	(2) Director must refer to SBA Headquarters recommendation for approval.	(2) Contracting agency may proceed under paragraph (j) of this section.

(h) *Notification of intent to issue on a contract with a value between \$100,000 and \$25 million.* Where the Director determines that a COC is warranted, he or she will notify the

contracting officer of the intent to issue a COC, and of the reasons for that decision, prior to issuing the COC. At the time of notification, SBA will give

the contracting officer the following options:

(1) Accept the Director's decision to issue the COC and award the contract to the concern (the issuance letter will

include as an attachment a detailed rationale of the decision); or

(2) Ask the Director to suspend the case:

(i) for a specified period of time, and to forward a detailed rationale for the decision to the contracting officer; or

(ii) to afford the contracting officer the opportunity to meet with the Area Office to review all documentation contained in the case file; or

(iii) to submit any information which the contracting officer believes SBA has not considered (at which time, SBA will establish a new suspense date mutually agreeable to the contracting officer and SBA); or

(iv) to permit resolution of an appeal by the contracting agency to SBA Headquarters under paragraph (i) of this section.

(3) After any discussions under paragraph (h)(2) of this section, the Director will issue the determination.

(i) *Appeals of Area Director determinations.* For COC actions with a value exceeding \$100,000, contracting agencies may appeal a Director's decision to issue a COC to SBA Headquarters by filing an appeal with the Area Office processing the COC application. The Area Office must honor the request to appeal if the contracting officer agrees to withhold award until the appeal process is concluded. Without such an agreement from the contracting officer, the Director will issue the COC. When such an agreement has been obtained, the Area Office will immediately forward the case file to SBA Headquarters.

(1) The intent of the appeal procedure is to allow the contracting agency the opportunity to submit to SBA Headquarters any documentation which the contracting officer believes the Area Office has not considered.

(2) SBA Headquarters will furnish written notice to the Director, Office of Small and Disadvantaged Business Utilization (OSDBU) at the secretariat level of the procuring agency (with a copy to the contracting officer), that the case file has been received and that an appeal decision may be requested by an authorized official at that level. If the contracting agency decides to file an appeal, it must notify SBA Headquarters through its Director, OSDBU, within 10 working days (or a time period agreed upon by both agencies) of its receipt of the notice under paragraph (h) of this section. The appeal and any supporting documentation must be filed within 10 working days (or a different time period agreed to by both agencies) after SBA receives the request for a formal appeal. The SBA Associate Administrator for Government Contracting (AA/GC) will

make a final determination, in writing, to issue or to deny the COC.

(j) *Decision by SBA Headquarters where contract value exceeds \$25 million.* (1) Prior to taking final action, SBA Headquarters will contact the contracting agency at the secretariat level or agency equivalent and afford it the following options:

(i) Ask SBA Headquarters to suspend the case so that the agency can meet with Headquarters personnel and review all documentation contained in the case file; or

(ii) Submit to SBA Headquarters for evaluation any information which the contracting agency believes has not been considered.

(2) After reviewing all available information, the AA/GC will make a final decision to either issue or deny the COC. If the AA/GC's decision is to deny the COC, the applicant and contracting agency will be informed in writing by the Area Office. If the decision is to issue the COC, a letter certifying the responsibility of the firm will be sent to the contracting agency by Headquarters and the applicant will be informed of such issuance by the Area Office. Except as set forth in paragraph (l) of this section, there can be no further appeal or reconsideration of the decision of the AA/GC.

(k) *Notification of denial of COC.* The notification to an unsuccessful applicant following either an Area Director or a Headquarters denial of a COC will briefly state all reasons for denial and inform the applicant that a meeting may be requested with appropriate SBA personnel to discuss the denial. Upon receipt of a request for such a meeting, the appropriate SBA personnel will confer with the applicant and explain the reasons for SBA's action. The meeting does not constitute an opportunity to rebut the merits of the SBA's decision to deny the COC, and is for the sole purpose of giving the applicant the opportunity to correct deficiencies so as to improve its ability to obtain future contracts either directly or, if necessary, through the issuance of a COC.

(l) *Reconsideration of COC after issuance.* (1) An approved COC may be reconsidered and possibly rescinded, at the sole discretion of SBA, in the following circumstances:

(i) If, after issuance of a COC, but before award of any contract in reliance upon such COC, SBA discovers that:

(A) the COC applicant submitted false or omitted material information; or

(B) new materially adverse information has appeared relating to the current responsibility of the applicant concern; or

(ii) Where the contract for which a COC has been issued has not been awarded within 60 days (in which case SBA may investigate the firm's current circumstances).

(2) Where SBA reaffirms the COC, the procedures under paragraph (h) of this section do not apply.

(m) *Effect of COC Certification.* By the terms of the Small Business Act, a COC is conclusive as to responsibility. Where SBA issues a COC on behalf of a small business with respect to a particular contract, contracting officers are required to award the contract without requiring the firm to meet any other requirement with respect to responsibility.

(n) *Non-Certification.* Denial of a COC by SBA does not preclude a contracting officer from awarding a contract to the referred firm.

(o) *Monitoring performance.* Once a COC has been issued and a contract awarded on that basis, SBA will monitor contractor performance.

#### **§ 125.6 Prime contractor performance requirements (limitations on subcontracting).**

(a) In order to be awarded a small business set-aside, a partial set-aside, an 8(a) contract, or an unrestricted procurement where a concern has claimed a 10 percent SDB price evaluation preference, a small business concern must agree that:

(1) In the case of a contract for services (except construction), the concern will perform at least 50 percent of the cost of the contract incurred for personnel with its own employees.

(2) In the case of a contract for supplies or products (other than procurement from a regular dealer in such supplies or products), the concern will perform at least 50 percent of the cost of manufacturing the supplies or products (not including the costs of materials).

(3) In the case of a contract for general construction, the concern will perform at least 15 percent of the cost of the contract with its own employees (not including the costs of materials).

(4) In the case of a contract for construction by special trade contractors, the concern will perform at least 25 percent of the cost of the contract with its own employees (not including the cost of materials).

(b) *Definitions.* The following definitions apply to this section:

(1) *Cost of the Contract.* All allowable direct and indirect costs allocable to the contract, excluding profit or fees.

(2) *Cost of contract performance incurred for personnel.* Direct labor costs and any overhead which has only

direct labor as its base, plus the concern's General and Administrative rate multiplied by the labor cost.

(3) *Cost of manufacturing.* Those costs incurred by the firm in the production of the end item being acquired. These are costs associated with the manufacturing process, including the direct costs of fabrication, assembly, or other production activities, and indirect costs which are allocable and allowable. The cost of materials, as well as the profit or fee from the contract, are excluded.

(4) *Cost of materials.* Includes costs of the items purchased, handling and associated shipping costs for the purchased items (which includes raw materials), off-the-shelf items (and similar proportionately high-cost common supply items requiring additional manufacturing or incorporation to become end items), special tooling, special testing equipment, and construction equipment purchased for and required to perform on the contract. In the case of a supply contract, the acquisition of services or products from outside sources following normal commercial practices within the industry are also included. In addition, where the services of a public or private utility company are obtained for the lease and use of distribution facilities such as telecommunications circuits, petroleum or natural gas pipelines, or electric transmission lines in connection with the performance of a contract, the acquisition of those services will also be considered as cost of materials.

(5) *Off-the-shelf item.* An item produced and placed in stock by a manufacturer, or stocked by a distributor, before orders or contracts are received for its sale. The item may be commercial or may be produced to military or Federal specifications or description. Off-the-shelf items are also known as Nondevelopmental Items (NDI).

(6) *Personnel.* Individuals who are "employees" under § 121.106 of this title.

(7) *Subcontracting.* That portion of the contract performed by a firm, other than the concern awarded the contract, under a second contract, purchase order, or agreement for any parts, supplies, components, or subassemblies which are not available off-the-shelf, and which are manufactured in accordance with drawings, specifications, or designs furnished by the contractor, or by the government as a portion of the solicitation. Raw castings, forgings, and moldings are considered as materials, not as subcontracting costs. Where the prime contractor has been directed by the

Government to use any specific source for parts, supplies, components subassemblies or services, the costs associated with those purchases will be considered as part of the cost of materials, not subcontracting costs.

(c) SBA will determine compliance with the Prime Contractor Performance Requirements (Requirements) as of the following dates:

(1) In a sealed bid procurement, as of the date the bid was submitted;

(2) In a negotiated procurement, as of the date the concern submits its best and final offer. If a concern is determined not to be in compliance at the time it submits its best and final offer, it may not come into compliance later for that procurement by revising its subcontracting plan.

(d) The Requirements will be considered an element of responsibility and not a component of size eligibility.

(e) The base contract period (excluding any options) will be used to determine compliance with the Requirements.

(f) Work to be performed by subsidiaries or other affiliates of a concern is not counted as being performed by the concern for purposes of determining whether the concern will perform the required percentage of work.

(g) The procedures of § 125.5 apply where the contracting officer determines non-compliance with the requirements applicable to small business set-aside or SDB-related procurements, and refers the matter to SBA for a COC determination.

Dated: November 11, 1995.

Philip Lader,

Administrator.

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### 13 CFR Parts 132 and 134

#### Rules of Procedure Governing Cases Before the Office of Hearings and Appeals

**AGENCY:** Small Business Administration.  
**ACTION:** Proposed rule.

**SUMMARY:** In response to President Clinton's government-wide regulatory reform initiative, the Small Business Administration (SBA) has completed a page-by-page, line-by-line review of all of its existing regulations to determine which might be revised or eliminated. The regulations proposed here would reorganize all but one of the regulations pertaining to procedures before the Office of Hearings and Appeals ("OHA") and consolidate them in one

part. In addition, the proposed regulations would clarify, simplify, and significantly shorten the existing regulations governing OHA. Finally, a number of substantive changes are proposed.

**DATES:** Comments must be submitted on or before December 27, 1995.

**ADDRESSES:** Written comments should be addressed to David R. Kohler, Regulatory Reform Team Leader, Attention: Part 134, U.S. Small Business Administration, 409 3rd Street, S.W., Suite 13, Washington, D.C. 20416.

**FOR FURTHER INFORMATION CONTACT:** Gary Fox, Chief Counsel for Special Litigation, at (202) 205-6643.

**SUPPLEMENTARY INFORMATION:** On March 4, 1995, President Clinton issued a memorandum to Federal agencies, directing them to simplify their regulations. In response to this directive, SBA has completed a page-by-page, line-by-line review of all of its existing regulations to determine which might be revised or eliminated. This proposed rule would consolidate all the existing regulations governing proceedings before OHA into part 134 with the exception of proceedings under the Program Fraud Civil Remedies Act, which would be covered in part 142 of this chapter. It would also clarify, simplify and revise the current rules, reorganize sections for ease of use, and eliminate unnecessary provisions.

As background, the following analysis discusses the anticipated effect of this proposed rule on SBA's current regulations.

The proposed rule would be divided into four subparts. Subpart A would contain general rules (currently subpart A). Subpart B (currently subpart B and §§ 124.210 and 124.211 (d) through (i)) would contain rules of practice applicable to all cases before OHA except size and SIC code appeals and proceedings under the Program Fraud Civil Remedies Act. Subpart C would contain the rules applicable to size and SIC code appeals (currently §§ 121.1701-1722). Subpart D would contain the rules for implementation of the Equal Access to Justice Act, currently contained in part 132. Proceedings covered by the Program Fraud Civil Remedies Act would continue to be contained in part 142 of this chapter.

A number of policy changes are also proposed. OHA's jurisdiction would be expanded to include cases brought under the Age Discrimination Act. At the same time, its jurisdiction would be narrowed to exclude contractor debarment and suspension proceedings, employee formal stage grievances,